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Nos. 84-1355 and 84-1343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. BENNETT, SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,
Appellants,

v.

G. HUGH WAMBLE, *et al.*,
Appellees,

and

DEMPSTER and PAULINE FERGUSON, *et al.*,
Appellants,

v.

G. HUGH WAMBLE and VERLINE COBBINS, *et al.*,
Appellees.

On Appeal From The United States District Court For The Western District Of Missouri

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MOTION TO AFFIRM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

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QUESTION PRESENTED

Whether the district court was correct in finding that the Title I bypass program, as currently administered in Missouri on the premises of religiously affiliated schools, violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

G. Hugh Wamble was the original plaintiff in the district court. In addition to the Secretary of Education, several former subordinate federal officials were also named in the lower court. Additional defendants named were the Blue Hills Homes Corporation and John P. Cole, executive director of the Blue Hills Homes Corporation. Verline Cobbins, Alma V. Burt, Helen M. Hardiman, Odessa Hill, Mae Bell Washington, Dorothy H. McDonald, Bernether Macklin, Frank Calcote, Russel M. Bradly, Walter A. Reed, Robert B. Parsons, Jr., Roy A. Dickie, William C. Heck, Jr., Clarence E. Shockly, Clinton Smith, Mack E. McCorkle, John A. Souris, Clyde Morton, Lee Shearer, Paule H. Linhardt, August Trost, Roy E. Willey, Forrest F. McBaine, Carl C. Desmond, Lyle Kenneth Vale, W. Carter Durbin, Jack C. Collister, Eldon J. Cusic, Jack Furlong, Dennis Hammontree, Thomas C. Hurt, Paul K. Kawakami, Jim S. Noel, Stanley A. Pearson, Duane C. Purdy, Larry McCrory, Joseph E. Sheets, Jr., Joseph E. Stewart, and Marcus W. Doughty intervened as plaintiffs in the district court.

Dempster and Pauline Ferguson, Eddie and Bernice Jimmons, Neal and Rose Plantz, Delores Snipes, Robert and Rebecca Torry, Leon and Rita Vanderfeltz, and Raphael and Hope Zapien were intervenor-defendants in the district court.

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On Appeal From The United States District Court For The Western District Of Missouri

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MOTION TO AFFIRM THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

Appellees G. Hugh Wamble, Verline Cobbins and thirty-eight others who intervened as plaintiffs in the court below move to affirm the judgment of the United States District Court for the Western District of Missouri for the reason that it correctly held Title I bypass as

administered in Missouri is unconstitututional under the Establishment Clause of the First Amendment and the Fifth Amendment. The decision of the district court in *Wamble* v. *Bell*, 598 F.Supp. 1356, (W.D. Mo. 1984), correctly applied previous rulings of this Court, and the questions raised by appellants are unsubstantial warranting no further argument. The question presented in this case is not identical to the constitututional issue before this Court in *Aguilar* v. *Felton*, Nos. 84-237, 84-238 and 84-239 (question of jurisdiction postponed to hearing on merits, Oct. 9, 1984), which was argued before this Court on December 5, 1984, and this Court should not grant appellants' request to hold this appeal in abeyance.

OPINION BELOW

The opinion below is reported at 598 F.Supp. 1356 (W.D. Mo. 1984), and is printed in government Appellants' Appendix.

JURISDICTION

Appellees admit that this Court has jurisdiction under 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision involved in this Motion to Affirm is the First Amendment to the United States Constitution, and Chapter 1 of the Education, Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801 *et seq.* (1982), amending and superseding Title I of the Elementary and Secondary Education Act of 1965, *as amended*, 20 U.S.C. §§ 2701 *et seq.* (1982) are the statutory provisions. Relevant portions of the First Amendment and the statutes are printed in the Appendix to government Appellants' Jurisdictional Statement (hereinafter cited as "App.").

STATEMENT OF THE CASE

A. The Proceedings Below

The record below consists of thousands of pages of deposition testimony as well as the testimony comprising a 21-day trial together with approximately 800 documents. Upon consideration of this extensive record, the district court determined that the Title I bypass program, as currently administered in Missouri on the premises of religiously affiliated schools, is violative of the First Amendment to the United States Constitution. The lower court entered a permanent injunction but stayed the enforcement of the injunction pending disposition by this Court in *Felton* v. *Secretary, United States Department of Education*, 739 F.2d 48, (2nd Cir.), *juris postponed, sub nom. Aguilar* v. *Felton*, Nos. 84-237, 84-238 and 84-239 (Oct. 9, 1984).

This case came to the district court through appellee Wamble, claiming standing as a federal taxpayer. The suit commenced in the Western District of Missouri on April 4, 1977, naming as defendants the then Commissioner of the United States Office of Education and Welfare and other government officials, as well as Blue Hills Homes Corporation (hereinafter "BHHC") and its executive director. The appellants are parents of children attending private schools in Missouri who were permitted to intervene in the matter and William J. Bennett as Secretary of the United States Department of Education. Appellees are G. Hugh Wamble, Verline Cobbins and 38 others who were permitted to intervene as plaintiffs on September 13, 1978.

Following the 21 days of testimony and review of thousands of pages of deposition testimony and hundreds of exhibits, the district court took under advisement the

constitutionality of the Title I program as administered in Missouri. Final arguments were heard on March 30, 1983.

On November 28, 1984, the district court issued its Opinion and findings and refused to stay disposition. The court found the Title I program as administered in the State of Missouri to be unconstitutional and violative of the Establishment Clause of the First Amendment. The court entered a permanent injunction but stayed the enforcement of that injunction pending disposition of *Aguilar* v. *Felton*. On December 24, 1984, the appellants filed their Notice of Appeal of the judgment entered by the court on December 3, 1984. Appellees move to affirm the lower court rulings.

B. The Challenged Program

The Title I program, insofar as it relates to the manner of private school children's participation herein challenged, is essentially the same as the program at issue in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). In *Wheeler* this Court held that Title I contemplates and requires the participation of private school children comparable to public school participation.

Such services are not required to be identical and must accommodate state constitutional church-state separation requirements. No particular services were required, but these principles were to apply, and the case was remanded to the district court to develop guidelines to assure compliance in Missouri with Title I.

The district court approved a plan which was the focus of much controversy and litigation. In the meantime, after this Court's ruling in *Wheeler* in 1974, Congress amended Title I to authorize a bypass of state and local authorities and permit direct Title I services through the use of independent contractors.

At the beginning of the 1975-76 school year, federal education officials saw the district court-approved state plan for Title I in Missouri as a "red flag," as the official then monitoring Title I in Missouri testified. According to his testimony, they were concerned only with the number of private school students actually participating under the new plan. The situation was so controversial that the federal monitoring official decided that his own self-interest required him to focus solely on the number of private school students actually participating (Cheatham, 10 Tr 90; 11 Tr 138).

On March 11, 1976, the United States Court of Appeals for the Eighth Circuit reviewed the new state plan and, without rejecting it, called for clarification as to services in which private school children could participate. *Barrera* v. *Wheeler*, 531 F.2d 402 (8th Cir. 1976). The court of appeals also ruled that this Court's ruling in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), "of course, limits the alternatives available under Title I." 531 F.2d at 405.

Federal officials ignored both *Meek* and the court of appeals ruling of March 11, 1976, and proceeded to take steps leading to a decision to implement the Title I bypass so as to *require* Title I personnel to provide instructional services on church school premises during regular school hours. This decision was made on July 22, 1976, and crossed that long step between "permissible to necessary" mentioned by Justice White in his dissent in *Widmar* v. *Vincent*, 454 U.S. 263, 282 (1981). This is not incidental aid to religion — this is a requirement forced on the state in a manner which created more than tension. It forced religious implementation within the state.

After conducting some pre-contract proceedings, the United States Office of Education (hereinafter "USOE") issued contracts to Blue Hills Homes Corporation on February 13, 1977, and two weeks later USOE waived

local educational agencies' ("LEAs") responsibility for serving private school children. Appellee Wamble filed this lawsuit on April 4, 1977, challenging the constitutionality of the Title I program in Missouri.

C. Implementation Of Bypass

As early as November 10, 1976, and prior to the issuance of the government request for proposals, the groundwork was laid to award the bypass program to Blue Hills Homes Corporation, an organization which, according to the district court, "appeared to be a religiously affiliated organization." Although its "apparent character" changed after the awarding of its second contract, its roots and personnel, the appellees contend, remained primarily religious. This influenced the hiring practices and overall administration of the Title I bypass program in Missouri in a manner which invited excessive governmental entanglement. For example, the hiring process sought suggestions from heads of parochial schools, and many of the teachers and supervisors were gleaned from the contacts which had roots with the early BHHC and its distinctly Roman Catholic beginnings.

The district court found that the administration of the on-premises program, as it was administered in Missouri, had both a history and danger or risk of excessive governmental entanglement. A most glaring issue, although it represented only an example of the problem, involved the undisputed display of numerous religious symbols and artifacts in the Title I classrooms. The lower court further noted the controversy and conflict which developed in at least one instance involving the attempted removal of one of the religious symbols. This, the court held, in applying standards enunciated by this Court in earlier decisions, created a potential for "political divisiveness," citing *Lemon* v. *Kurtzman*, 403 U.S. 602, 615 (1971).

The district court's concern was not of religious symbols alone. The entire history and application of the program amply demonstrated excessive governmental entanglement involving what the court referred to as "spiritual identification." Rather than adopt a "per se" rule, the district court, after extensive testimony and review of the record, determined that the Title I bypass program, as administered in Missouri on the premises, was unconstitutional and on the facts of the case, echoing the concern of *Lemon*, announced the "precipice lies here." This was the court's holding after careful consideration and deliberation over testimony addressing all aspects of the administration of this program in Missouri.

D. The Entanglement History

In evaluating the Title I program as administered in Missouri, the district court addressed in its opinion the excessive entanglement required of the government in preventing teachers from indoctrinating children with values of the church. The court noted, not only the obvious existence of religious symbols, which the program could not control, but the more subtle pervasive presence of religion which required monitoring of instruction to guard against visible religious authorities, who by their presence at or near a Title I room, might inadvertently pressure teachers to conform.

The testimony provided a legitimate basis for concern in this regard because those who testified concerning the maintenance of the requisite religiously neutral setting, conveyed to the court their lack of understanding, or perhaps indifference, to the constitutional principle in the Establishment Clause. For example, even though a crucifix is an object to be excluded under the requirement of religiously neutral setting, the BHHC federal project officer testified that a crucifix "has no meaning . . . [t]o

people who see them on a daily basis." And that "people tend to forget them." (Williams-Madison, 13 Tr 74-75)[1] Further testimony confirmed that the project officer saw no need to make inquiry and in fact did not make an inquiry about religious symbols in the Title I rooms at times other than when Title I instruction was taking place (Williams-Madison 1/8/82 dep 7).

At the trial the BHHC federal project officer also testified that she was not concerned if an altar was uncovered in the Title I room shortly before instruction; she was mainly concerned with what transpired during instruction. The district court heard testimony revealing that nothing written addressing the religious neutrality issue was ever provided to BHHC personnel, and the contractual agreement contained nothing on the subject either (Cole, 4 Tr 125, 128 and 151).

Those involved in the administration of the Title I program demonstrated further ignorance and insensitivity about the question of religious neutrality when it was acknowledged, for example, that Bibles have no religious impact (Cole, 4 Tr 140). On another occasion, a Title I teacher did not notice the crucifix hanging in the Title I room in Christ the King School (Toole dep 122-125).

Another example of this sort occurred shortly after the beginning of the Title I bypass at St. Francis Xavier School in St. Joseph, Missouri. A bypass teacher in-

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[1] Page reference designated "(____, Tr ____)" refer to the trial transcript and the witness testifying; page references designated "(____ dep ____)" refer to depositions of witnesses received into evidence. When dates appear within the reference the dates refer to the date of the deposition. Reference designated "(PX ____)" are to appellees' exhibits; references designated "(DX ____)" are to the government appellants' exhibits; references designated "(IDX ____)" are to the Ferguson appellants' exhibits.

structed a custodian to remove a crucifix in the Title I room. The custodian thought the request inappropriate and notified the principal. The principal then contacted BHHC's executive director (John P. Cole) who personally traveled to St. Joseph to take care of the matter. Cole agreed that the teacher's action was inappropriate and told the teacher that her concern over the crucifix was in order but that BHHC lacked authority to dictate to anyone at the private school. The bypass teacher apologized to both Cole and the principal. Eventually the crucifix was removed (Cole 4 Tr 136-137), but there was periodic jurisdictional banter over who had the authority to remove or to ask for the removal of religious objects from Title I rooms (Toole dep 129), and the conclusion that a religiously neutral setting is too ambiguous (Gines 15 Tr 190).

Delores Gines of BHHC further testified that she attempts to follow a "consensus" view of what a religious item is because experts are not able to define the term (Gines 15 Tr 196-198). Further evidence of this ambiguity was confirmed by a former Catholic superintendent in Missouri who did not consider the picture of a Pope or archbishop to be a religious item (Leibrecht 2/17/78 dep 218-219), as in the DePorres School in St. Louis (Torry 9/19/78 dep 36), whereas a Lutheran principal considered a bust of Martin Luther to be a religious symbol (Eggerding dep 120, 142-143).

The court also received testimony about religious symbols observed and photographed in a Title I room on February 2, 1979, when appellee Wamble conducted an inspection of Title I schools in Kansas City. The crucifix on the wall of that Title I room was photographed at Our Lady of the Americas School in Kansas City (Wamble, 1 Tr 93-95; PX 1202b, c; Hagan, 7 Tr 19-22).

The crucifix was in the room at the time that BHHC's representative visited the school before starting bypass services at the school (Hagan, 7 Tr 23). The crucifix was still in the room when the principal received a letter from the superintendent Schmiedeler in October of 1977 transmitting a copy of "Guidelines for Principals with Title I Programs," but she did not remove the crucifix.

Delores Gines of BHHC visited the Title I room and witnessed the crucifix before appellee Wamble's visit, but she did not discuss the presence of the crucifix with the principal (Hagan, 7 Tr 29). The crucifix remained in the Title I room during BHHC's first year (1977-1978) (Hagan, 7 Tr 21).

During the 1978-79 school year, during which appellee Wamble inspected the school in mid-year, at least two bypass teachers and two bypass aides worked in the room before Wamble's visit, but none discussed with the principal the presence of the crucifix (Hagan, 7 Tr 22-23). Supervisors had also visited the site from time-to-time (Gines, 16 Tr 26). Apparently the matter was of sufficient magnitude as far as the parishioners and the school board of Our Lady of Americas School were concerned so that Mr. Schmiedeler was forced to seek the bishop's advice over this matter (Schmiedeler, 19 Tr 201).

The history of the development of the program itself provides ample proof of excessive entanglement experienced in the Missouri program. The "Guidelines for Principals," for example, were ostensibly a project of school superintendents. However, they were actually developed and circulated by attorneys for the U.S. Catholic Conference in response to this litigation.[2]

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[2] See appellees' Appendix 1a-5a which bears upon the historical development of these guidelines, particularly Appendix p. 4a wherein superintendents are counseled to maintain the appearance of being a project of the superintendents.

The program as it developed presented demands for constant monitoring or surveillance. Undisputed testimony was presented that members of religious orders were present in Title I classrooms, and numerous visits by priests occurred (Gradwohl, 21 Tr 31-36). The district court heard further testimony indicating that no specific effort was made to determine whether in fact religious discussions occurred in the Title I classrooms (Williams-Madison 1/7/82 dep 40; West dep 8, 39).

The area of discipline gave further evidence and support for the court's conclusion that excessive governmental entanglement is required in order to determine whether the various Title I guidelines are being followed. This testimony in some respects gave the court a picture of those who were indignant at the prospect of BHHC suggesting guidelines to the effect that the principal is not to supervise Title I.

Sister Margaret Mullin, principal of St. Francis Xavier School in St. Louis was offended by the publication of guidelines claiming that such guidelines undermine the authority of principals in the parochial school who are responsible for all that happens in the school (PX 32; Mullin 9/5/78 dep 107-112). Other principals claimed similar rights, such as the principal of Our Lady of Perpetual Help School in St. Louis, and the principal of Our Lady of Americas School in Kansas City. The court also heard testimony to the effect that BHHC's top administrators operating the St. Louis office sent the principals of church schools a form with which to evaluate Title I personnel (PX 974, PX 1265; Rustige dep 17-18, 60; Eggerding dep 145).

The various schools wherein Title I programs were being administered, were in many cases indistinguishable from other rooms at such schools. To the students of such schools in these circumstances, the Title I program

appears to be an integral part of the parochial school and the religious ministry. In many cases nothing on the signs welcoming individuals to the Title I classroom indicated that they were being operated by the federal government as opposed to the religious institution wherein the classes were being held (Nichols, 16 Tr 151; Silverman, 17 Tr 95; Thomas, 17 Tr 42). In at least two instances, the record confirms that the church itself was used rather than adjacent buildings (Toole dep 125-157; Rustige dep 122-123; 125-127; Wamble, 9 Tr 31-34).

On the basis of the record, the district court had no difficulty in finding the Title I program in Missouri to be "pervasively sectarian."

APPELLANTS' QUESTION IS NOT SUBSTANTIAL, AND THE DISTRICT COURT SHOULD BE AFFIRMED.

The record in this case is extensive, and it demonstrates beyond doubt that efforts to assure religious neutrality in the Missouri Title I program are merely *pro forma*. BHHC supervisors do not ensure the absence of religious symbols within the Title I rooms, nor do they provide "extensive oral instructions" to ensure that BHHC Title I personnel "fully understand and adhere to the purely secular role in delivering Title I services."

The record amply demonstrates that BHHC has been unable to ensure the suitability of Title I facilities through the obtaining of assurances from church schools. Written assurances from parochial schools has not halted the violation of the religious neutrality requirements. Religious symbols still appear in Title I rooms, and conflict between church and governmental authorities has occurred in the past and present a grave potential for recurrent clashes because of shared control over facilities and students by church and government.

The district court noted specific instances in which the on-premises Title I program had in fact resulted in substantial entanglement between religious and governmental officials. The court conducted a trial between August 2, 1982, and January 13, 1983, hearing extensive testimony from officials of the United States Department of Education and Title I teachers from Blue Hills Homes Corporation as well as principals of Catholic and Lutheran schools. The trial court also received into evidence thousands of pages of deposition testimony and hundreds of exhibits. After extensive briefing and an extended period of deliberation, the court held:

> Instruction conducted *on the premises* of pervasively sectarian institutions . . . creates in Missouri an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessively entangling surveillance.

(App. 32a-33a)

In a footnote, the trial court made clear that it was not blindly applying some rule of law announced in *Meek* v. *Pittenger:*

> Some might argue that this is an "absolutist" approach, a "categorical imperative" or a "per se" rule. In response, this court notes first, that it is a holding *based on its finding that the Title I rooms are not truly religiously neutral, a finding supported by numerous incidents wherein religious symbols were found in these rooms and by facts which indicate that the on-premise Title I rooms are in most instances physically and educationally identified with the parochial institution. See* pp. 15-16. Second, the court notes that such a holding reflects no more an "absolutist" approach than the Supreme Court's own guidelines on textbooks, buses, diagnosticians, and equipment which, while they appear to be "per se"

> rules, obviously followed a similar analysis. [Emphasis added]

(App. 33a, n. 13)

The government in its Jurisdictional Statement flatly asserts "BHHC supervisors inspect on-premises Title I classroom facilities to ensure that religious symbols are not present. . . ." The Ferguson appellants, who are parents of students attending parochial schools in Missouri, in their Jurisdictional Statement similarly state "Blue Hills supervisors inspect the Title I facilities to ensure that the sites are adequate and free of religious artifacts."

However, in this case even counsel for the church-school parents was forced to admit that "religious symbols were found in Title I classrooms on fifteen occasions." (Ferguson Jurisdictional Statement at 12).

It is not difficult to understand that the district court would be concerned about the constitutional reliability of BHHC's Title I service on church school premises where, after several years of experience, religious symbols were still present in Title I classrooms. After all, religious symbols should be the easiest breach of religious neutrality to monitor. These symbols, however, were easily visible to appellee Wamble during his random examination of various Title I schools conducted after the filing of his lawsuit, as well as by the random examination of Title I schools by federal auditors.

If in Missouri BHHC is not able to monitor and control violations of the religious neutrality requirements which are so apparent to the naked eye with even the most casual of inspections by BHHC or federal monitors, it is easy to see why the trial court was concerned about more subtle and less easily discernible breaches of religious neutrality. Simple logic would suggest to a constitutionally sensitive federal judge that in light of the large number

of easily detected violations "[i]nstruction conducted *on the premises* of pervasively sectarian institutions . . . creates in Missouri an unacceptable *risk* that teachers here will foster religion and the corresponding necessity for excessive entangling surveillance." (App. 32a-33a) It is equally understandable why the trial court also concluded, as did this Court in *Wolman* v. *Walter*, 433 U.S. 229 (1977), that "[o]n-premise teachers, although technically and legally supervised by state authorities are presumptively influenced by the environment in which they work, and this enhanced opportunity for influence requires greater supervision." (App. 33a)

The BHHC teachers and supervisors were unable to keep Title I rooms free from religious objects during the course of litigation involving the very issue of religious neutrality of the Title I program. The federal court properly expressed due concern for the less perceptible "subliminal pressure exerted by the mere presence of a priest in the hall or at the door, by religious books in every students' hands and by a teacher's own felt presence of the Church in the room." (App. 34a)

The trial court had every right to give credence to the testimony of Monsignor Leibrecht, who was called as a witness by counsel for the intervening parents of the parochial school students. Monsignor Leibrecht had spent 19 years as a Catholic educator in the archdiocese of St. Louis. Nine of those years were spent by him as superintendent of schools for the archdiocese (Leibrecht, 18 Tr 17).

On cross-examination Monsignor Leibrecht was questioned about a number of articles he had authored on the

general topic of religious permeation in Catholic schools (*id.* at 104-127). In one of these articles, he stated:

> Frequently enough when one speaks about distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing called atmosphere. It comes not from the physical facilities, or the religion classes, or the students—at least not chiefly. It comes, for good or for bad, from the faculty. The most distinctive and valuable thing the Catholic school can offer to parents is its faculty—even more important than the religion classes themselves or the totality of curriculum.
>
> * * *
>
> When the student comes into the Catholic school, he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible is that spirit created by the common Christian life consciously lived by the faculty and participated in by the students.

Leibrecht, *Thoughts on the Catholic School*, The Catholic Educator, 27 (May, 1966) (PX 1292, at 28 and 33).

That "atmosphere" is precisely the problem, and this Court in *Meek* and *Wolman* was more than justified in expressing concern about the potential for subtle pressures being exerted upon teachers of common religious faith as that of the sponsoring church. The record here gives support for this Court's prophesy which came true in Missouri, to wit: crucifixes having no meaning when seen daily, Bibles having no religious impact, and crucifixes that are daily viewed but obviously not consciously seen, underscore the subtle, yet intense, spirituality of

the atmosphere which the religiously neutral court saw as pervasive in these parochial schools. In fact, the atmosphere is so pervasively, yet subtly, ecclesiastical that the sacred becomes subliminally lost in day-to-day sectarian exposure. Appellants' attempt to disprove the presence of an all-pervasive sectarian atmosphere establishes just the opposite.

This Court in *Lemon* v. *Kurtzman*, 403 U.S. 602, 618 (1971), "recognize[d] that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." Also, in *Wolman* v. *Walter*, 433 U.S. 229, 247 (1977), this Court, like Monsignor Leibrecht, observed that "pressures of the [religious] environment may well alter . . . behavior from the normal course."

A remedial reading teacher who taught in a Catholic parochial school for BHHC for five years, testified at the trial that she "had to be so very, very careful during the time in the Blue Hills program to maintain the separation of church and state" but that she "longed to have the freedom to discuss religion." She stated that she "was a fundamentalist Christian." She testified: "I wanted to be able to share my Christian belief with the children that I taught." She stated that it was because of this that she quit BHHC and became a teacher at a Christian school where she was able to freely share her religious faith with the children (Gradwohl, 12 Tr 38-39).

A remedial teacher with a less conscientious view of church-state separation, particularly if of the same faith as the sponsoring church and the majority of the student body, might well have succumbed to the temptation to share his or her Christian belief. "Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective

acceptance of the limitations imposed by the First Amendment." *Lemon* v. *Kurtzman*, 403 U.S. at 619.

The district court easily saw that this case involves teachers acting on an individualized basis. In fact, the BHHC program in Missouri was set up in such a way that even though five or ten children may come to the Title I room in a group, BHHC attempts to develop a program of remedial activities so as to respond to a particular child's needs. Sometimes that means working with a student on a one-to-one basis (Cole, 7 Tr 71-72). The executive director of BHHC testified that if a child has emotional problems that could affect the providing of remedial reading, math or language arts, the Title I teacher might speak to a classroom teacher, a principal, a counselor or even a priest (Cole, 6 Tr 74).

The district court, in its Opinion, noted that "unlike the diagnosticians discussed in *Wolman*, teachers are afforded a unique opportunity to form substantial and enduring relationships with students and to transmit ideological views." (App. 31a) In *Wolman* v. *Walter*, 433 U.S. 229, 244, this Court, in contrasting the type of contact that a teacher and a student enjoyed with the contact between a public diagnostician and a student, observed that the latter's contact "involves chiefly the use of objective and professional testing methods to detect students in need of treatment." But, the relationship between teacher and student or counselor and student was substantially different. Here, a relationship approaching a one-on-one teacher-student or counselor-student relationship compounds the opportunity for the transmission of ideological views.

In *Public Funds for Public Schools* v. *Marburger*, 358 F.Supp. 29, 40 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974), the Court noted that a publicly employed remedial teach-

er, providing services within a parochial school, would be subject to the religious atmosphere of the school, but also "the arrangement may provoke some controversy, as noted in *Lemon*, between the auxiliary teachers and the religious authority over the precise meaning and extent of the legislative retraints." This possibility became a reality in this case.

The prior teaching of this Court no doubt influenced the lower court to observe that "[r]eligion demands a spiritual identification. . . . And if the otherwise religious environment, through governmental control, is substantially altered to obtain government-funded aid, the very evil against which the Founding Fathers sought to protect has been fostered—the church has been compromised." (App. 35a)

In its Opinion, the district court specifically noted that the evidence revealed that Title I personnel and regular nonpublic school teachers meet, not only to discuss the children's educational needs and progress, but that "BHHC personnel contact the private school administrators to secure the removal of any religious symbols." (App. 14a) The trial court expressly observed the direct confrontations sometimes required in order to obtain removal of religious symbols, in one instance "amid protests from the pastor and school board and after the superintendent of the Kansas City Archdiocese Schools consulted the bishop." (App. 15a)

Religious neutrality is required but impossible to achieve in the Missouri Title I program. As conceived, an administrative divisiveness prevailed. Testimony of those representing the public school interests who appeared before the trial court reflected a political divisiveness between various authorities of the parochial and public schools of the state. One would have to be

blindfolded not to realize that the heat was generated by a long-standing political-religious conflict between public school partisans and those who seek public funding for parochial schools.

The Title I conflict, as represented by this lawsuit and the earlier case of *Wheeler* v. *Barrera*, is only the latest example of this political division. There is evidence that the Missouri Baptist Convention found it necessary to adopt a resolution against the Title I bypass in Missouri (Wamble, 9 Tr 30-31). Counsel for intervenor-defendants in his opening statement before the trial court, in effect, acknowledged the existence of a diverse controversy along religious and political lines which predated this litigation (Transcript of Opening Proceedings at 35-36).

Counsel for appellants Ferguson apparently acknowledged that appellee G. Hugh Wamble was acting on behalf of the Missouri Baptist Convention. It is clear that the controversy generated rose to a point that even counsel for appellants Ferguson was evoked to a passionate attack upon Mr. Wamble's character, which, because of his agency relationship on behalf of the Missouri Baptists, could only be interpreted as a conflict between the interests represented by counsel for the Ferguson appellants and the Missouri Baptist Convention.

The original makeup and operation of BHHC as a religious organization certainly contributed to the political divisiveness which ultimately resulted. This early religious composition lead to the political divisiveness which was destined to continue long after BHHC elected new members to its board of directors (App. 10a-11a).

In this same vein the court below noted that "BHHC was incorporated . . . as a nonprofit Missouri corporation by four affiliates of St. Therese Catholic Church, including the pastor at that time, Norman Rotert." The court

also observed that "[i]t originally operated out of office space in buildings owned by St. Therese Church, and many of the teachers first hired were persons known to BHHC through their common affiliation with the parochial schools." (App. 11a)

As the district court further stated "[t]he bypass, including administrative costs, is funded by withholdings from Missouri's SEA allocations." (App. 12a) Unlike the local school districts, BHHC receives a management fee, an extra portion of the federal funds, based upon the number of "identified" and "eligible" Title I parochial school students (PX 1195).

The trial court further stated that "[u]nlike *Tilton* v. *Richardson*, 403 U.S. 672 (1971), in which the aid was a 'one-shot' allocation of funds . . ., the Title I program requires continuing allocations" which ultimately generate "aggressive constituencies." (App 29a) The Missouri bypass has a built-in catalyst for conflict and discord between two competing educational systems, each seeking sufficient moneys to maximize the benefits for students attending their respective school system—public or parochial.

Local public school administrators annually scrutinize and compare the per pupil cost for Title I services made available to BHHC—services provided within the parochial schools of their district (Gooden, 11 Tr 24-25, 28-30; PXs 1404, 1405), and bitterly resent what appears to them to be the providing of greater opportunity for Title I benefits afforded eligible church school students (Gooden, 11 Tr 49-51). Public school officials, knowing that there are not sufficient funds available to serve *all* Title I eligible students, are offended by the 100% Title I eligible student participation in some private schools (Baker, 2 Tr 97-98; Gooden 11 Tr 96-98; Nichols, 16 Tr 154).

The Missouri bypass presents an annual contest by two separate administrations for the same pool of tax funds. This annual quest regularly salts the festering wounds of former political-religious conflicts within Missouri. This Court correctly predicted that when there is competition between public and parochial educational systems for the same tax dollar, people "will find their votes aligned with their faith." *Lemon* v. *Kurtzman*, 403 U.S. at 622.

The bypass permits a result whereby "private school students with much higher scores and, therefore, relatively less need, [are] being served [over] students in the public sector" (Baker, 2 Tr 98). This has caused tension between the competing interests with public school tax levies being used as political pawns. Such a situation resulted in an official resolution by the Boonville, Missouri, School Board predicating school board action based upon the perceived "ill will being created in the local community between individuals who hold a common interest for the welfare of all children, both public and private." (Gooden, 11 Tr 17-22).

Although political divisiveness along religious lines may not be an undisputed test of constitutionality, "political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be *evidence* that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion." *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1367 (1984) (O'Connor, J., concurring). (Emphasis Added)

The district court is fully supported by the prior decisions of this Court, including *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756 (1973), and *Wolman* v. *Walter*, 433 U.S. 229 (1977). The decision of the trial court here is also consistent with the reasoning of the court expressed in

Lynch v. *Donnelly*, 104 S.Ct. 1355 (1984). Perhaps more importantly, the extensive facts of record developed in this case prove the wisdom of the court's earlier rulings, including the holdings of this Court that support the claim that the providing of educational services by public school teachers within the confines of the church-operated school generates constitutionally prohibited entanglement between church and state. The judgement below is clearly in accord with the prior decisional law of this Court, and the lower court should be affirmed.

WAMBLE AND *AGUILAR* ARE NOT IDENTICAL.

The government seeks to have this appeal held for disposition in light of *Aguilar* v. *Felton*, and in the alternative, seek to have probable jurisdiction noted. Appellants Ferguson further request that after the decision in *Aguilar* v. *Felton* the case be remanded for further proceedings in the district court consistent with the Court's decision in *Aguilar*, or in the alternative, note probable jurisdiction and grant a plenary hearing.

Appellants contend in their Jurisdictional Statement that the constitutional issue presented by this case is virtually identical to that now before this Court in *Aguilar* and is closely related to the issue presented in *School District of Grand Rapids* v. *Ball*, *cert. granted*, No. 83-990 (Feb. 27, 1984). Factually, this case is closer to *Grand Rapids* than to *Aguilar*, but still presents issues that are distinct and different. It would be a waste of judicial energy to fail to give attention to the facts developed in view of the complete record in this case and other differences in the two cases. Appellees would, however, contend that *Aguilar*, *Grand Rapids* and this case represent an ideal trilogy of cases which should give substantial guidance to the lower courts in subsequent Establishment Clause cases.

As the record in *Aguilar* reflects, the decision in that case was based upon a district court's granting of defendant's motion for summary judgment dismissing plaintiff's complaint and holding that plaintiffs had failed to show that Title I, as administered in the nonpublic schools of New York, violates the Establishment Clause of the First Amendment. The court of appeals reversed and granted summary judgment to plaintiff. In that case the parties stipulated that the case was to be decided upon the record in *National Coalition for Public Education and Religious Liberty* v. *Harris*, 489 F.Supp. 1248, (S.D. N.Y.), *appeal dismissed*, 449 U.S. 808 (1980) (hereinafter "PEARL"), along with certain affidavits supplementing those previously filed.

Unlike this case, the court heard absolutely no testimony, and most of the evidence was submitted by the defendants. In *PEARL*, an evidentiary hearing was conducted in May of 1979. At that time plaintiff called only one witness.

Pursuant to an agreement reached at a pretrial conference, the defendants presented the bulk of their case in the form of a narrative summary which was received into evidence. This summary synthesized numerous affidavits, which describe the operation of New York City's Title I program in nonpublic schools. The defendants also called seven witnesses who were teachers or administrators in the program. 489 F.Supp. at 1252.

At the start of the evidentiary hearing, plaintiffs' counsel stated that there was no evidence showing that New York City's Title I program was unconstitutional and explained that PEARL had sought to discontinue the suit against the city because "proof of such a 'constitutional' violation and the financing of a trial record is beyond our means.' " *Ibid.* The city, however, rejected plaintiff's

discontinuance offer, and the plaintiff asked the court to enter judgment in favor of the city and allow the case to go forward against the two federal officials. The court did not grant the request, and plaintiff conceded that "there is no violation in respect to any school within the City of New York and we ask no relief against the City of New York." *Ibid.*

Toward the end of the hearing, plaintiff's counsel stated that "[o]ur basic premise is the statute on its face as construed by the Commissioner of Education is unconstitutional irrespective of what happens in any school anywhere in the United States." *Ibid*

Unlike either *Aguilar* or *PEARL*, the district court here devoted a full month of its trial calendar plus extensive post-trial briefing to permit a fully developed record (App. 2a).

In the jurisdictional statement filed by the government in *Aguilar*, the government at page 22 indicated its concern for having the issues raised in *Aguilar* addressed only inferentially by the decision in *Grand Rapids*. The government indicatd that "a decision in *Grand Rapids* alone may leave unresolved the constitutional questions that the court of appeals decision raises about the program that has been challenged in this case."

The facts in this case are so unlike the facts developed in the one-sided and sparse record in *Aguilar* that the lower courts will still be left with something less than complete guidance in this area. Numerous distinctions between *Aguilar* and this case have already been pointed out in this brief.

In addition, intervenor defendants in *Aguilar* extraneously argue that the private schools involved are not even pervasively sectarian. But the record in *Aguilar* is nonadversarial on that issue, whereas here the issue was

addressed with a fully developed record after extensive pretrial discovery.

Thus, the district court could state with certainty that it "encounters no difficulty in finding on the basis of the record made here that the religiously affiliatd elementary schools in Missouri at which BHHC conducts classes funded by federal tax dollars are pervasively sectarian or indistinguishable from those that are for purposes of constitutional analysis." (App. 28a-29a) The determination of whether the private schools are pervasively sectarian ultimately depends upon the decision of the court or a rule of law developd by the court in this area. In addition, as the district court noted in this case, the history of litigation over title I in Missouri is well documented by various court decisions, including the decision of this Court in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974) (App. 6a, n. 4).

Aguilar represents, in essence, a continuation of the litigation in PEARL. A comparison of the instant case with the decision in *PEARL* will to some degree illustrate the distinction between the two cases:

(1) In *PEARL* plaintiffs called only one witness and depended upon hypothetical questions. *Id.* at 1252. Appellees in this case have done just the opposite. They have not relied upon hypothetical questions; rather they have established a comprehensive record.

(2) In *PEARL* the court speaks of "undisputed evidence," *id.* at 1253, "uncontroverted evidence," *id.* at 1262, and "undisputed testimony," *id.* at 1267. Of course in this case there is a full evidentiary record, and many of the facts are disputed.

(3) In *PEARL* the court referred to "peripatetic teachers." *Id.* at 1252. The court under the New York program gave weight to the fact that the teachers there were itinerant and spent less than five days a week at the same

school. *Id.* at 1256. As the record indicates in Missouri, BHHC abandoned the concept of half-day itinerant teachers (Cole, 4 Tr 95, 96; Rustige dep 121).

(4) In *PEARL* the court found that periodic evaluations and direct program supervision assure that Title I staff members comply with the board's guidelines and restrictions. *Id.* at 1256. In this case there is substantial evidence presented to demonstrate that the evaluation and program supervision is a farce.

(5) In *PEARL* it was noted that "Title I teachers and nonpublic schools occupied classrooms that are specifically designated solely for that purpose" *Id.* at 1257. Here the Title I rooms, although generally referrred to as such, certainly are not clearly separated from the remainder of the school. In addition BHHC consistently failed to guarantee that the Title I rooms had been free of religious symbols, pictures, or statues.

(6) In *PEARL* the court made reference to the fact that the New York classrooms are "free from religious symbols." *Id.* at 1264. Even though this lawsuit was filed immediately after the commencement of the program, that apparently was not sufficient pressure to keep the schools in line and to keep BHHC successfully monitoring the Title I rooms to make certain that there were no oversights with regard to the presence of religious symbols.

(7) In *PEARL* the court cited *Wheeler* v. *Barrera*, 417 U.S. at 426, for the proposition that "a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public school control, is sent into a parochial school to teach special remedial courses a few hours a week." In Missouri we have former parochial

school teachers sent into parochial schools on full day permanent assignments. *Id.* at 1257. *See* Appellees' Appendix p. 6a-7a regarding BHHC's policy on extent of contact between Title I teachers and school personnel.

(8) The court in *PEARL* further stated "the mere identity of the party receiving government aid is not necessarily dispositive in determining whether a statute primarily advances religion." *Id.* at 1259, quoting *Nyquist* and *Sloan* v. *Lemon*, 413 U.S. at 825 (1973). There the Supreme Court looked beyond the parent to the school. Here the schools consider the program to be part of their overall program; the principals have evaluated teachers; they have observed the Title I classes; they have disciplined students for problems in Title I classes; and they have become indignant at the suggestion they should disinvolve themselves from Title I.

Even counsel for appellants Ferguson in this action recognizes that *Aguilar* and the Missouri case are not identical. Charles H. Wilson, in an article he authored in the September, 1982, edition of The Catholic Lawyer entitled *ESEA Title I Litigation—A National View*, acknowledged this fact. Referring to five cases, one of which was *Wamble*, he said:

> What we have discovered is that there are great deviations from the *Pearl* model, and in my view, the greater the deviation, the greater the risk that the program will fail.

Another distinction between *Aguilar* and *Wamble* is whether or not the Title I bypass program, as applied, has the primary effect of advancing or inhibiting religion. The record was made and the issue raised in *Wamble*, whereas no such record was made in *Aguilar*. Appellants state in their Jurisdictional Statement, "[t]he court below did not decide whether the Title I bypass program's primary effect advances or inhibits religion because it held that

there was a violation of the excessive entanglement element of the test." The discriminatory impact of the Missouri Title I bypass program, as applied, is an issue which appellees will address more fully in a cross-appeal to be submitted contemporaneous herewith.

CONCLUSION

The decision of the district court properly rests on long-standing Supreme Court precedent. Appellees respectfully request this Court, for the reasons herein stated, to affirm that judgment. In the alternative, we request that the Court note probable jurisdiction and grant a plenary hearing. Appellees further respectfully request that this case be expedited so that a decision may be forthcoming along with *Grand Rapids* and *Aguilar*, or in the alternative, that the decision at least in *Aguilar* be deferred so that both *Aguilar* and this case may be ultimately jointly considered by this Court.

Respectfully submitted,

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